

August 6, 1999

**Who Betrays America's Secrets?**

**Foreign Intelligence Surveillance Act and  
Espionage by "United States Persons"**

The Foreign Intelligence Surveillance Act of 1978 (FISA) sets out the procedures for acquiring a secret judicial order to authorize electronic surveillance or a physical search in foreign intelligence cases. When FISA was enacted, the Senate Judiciary Committee said the Act would strike "a sound balance" between national security and individual liberty. Today, there is substantial doubt that FISA can keep that promise.

Yesterday, Senator Fred Thompson, chairman of the Committee on Governmental Affairs, and Senator Joseph Lieberman, ranking minority member, issued a detailed statement on the way in which the Department of Energy, the FBI, and the Department of Justice handled the investigation of possible nuclear espionage at the Los Alamos National Laboratory. The statement was based on nearly 13 hours of closed hearings and extensive investigation of the case.

Senators Thompson and Lieberman concluded that the Government's investigation was characterized by "investigatory missteps," "institutional and personal miscommunications," and "legal and policy misunderstandings and mistakes at all levels of government." Senator Lieberman concluded that "there was a shocking lack of thoroughness, competency, and urgency in the government's investigation." The Senators were particularly troubled by the way in which the Department of Justice interpreted FISA, and a substantial part of their report discusses FISA.

At a joint press conference, Senators Thompson and Lieberman differed somewhat on whether FISA needs to be amended, but both agreed that the Department of Justice had made fundamental and far-reaching (and potentially tragic) mistakes in applying FISA.

This paper sketches FISA's requirements, particularly with respect to what the Act calls "United States persons," and then reminds us that the greatest threats to U.S. secrets always come from that very same class of persons.

**FISA's Roots**

Throughout most of the 20<sup>th</sup> Century, Presidents unilaterally authorized warrantless national security wiretaps and even physical searches, and neither the courts nor Congress played any significant role. In 1978, however, in response to abuses by the Executive Branch and new interpretations by the Judicial Branch, Congress passed and President Carter signed FISA, Public

Law 95-511, 50 U.S.C. §1801 *et seq.* In truth, FISA's roots are entwined around some notable disputes between the three branches of the Federal Government.

## How FISA Operates

Under FISA, federal district court judges are designated to sit as members of the Foreign Intelligence Surveillance Court (FISC) and to consider the Government's applications for electronic surveillance. The Act requires a FISC judge to approve an application when three criteria are met, 50 U.S.C. §1805.

- First, the application was requested by an authorized government officer and contains all necessary certifications.
- Second, there is probable cause to believe that the target of the electronic surveillance is working for a foreign power and that the places to be "surveilled" are being used by the foreign power. [The issue of "probable cause" is discussed in the Appendix.]
- Third, the proposed order complies with FISA's requirements for minimizing the acquisition, retention, dissemination, and disclosure of information.

## "United States Persons"

FISA draws a distinction between "United States persons" and all other persons. This distinction is intended to help secure the liberties of "United States persons," which FISA defines as U.S. citizens, resident aliens, and U.S.-connected groups. 50 U.S.C. §1801(i). Among the half-dozen or so protections for "United States persons" are:

- The definition of "agent of a foreign power" is considerably narrower for a "United States person" than for others. 50 U.S.C. §1801(b). This is a key point inasmuch as FISA allows the issuing of an order only if the FISC judge finds that "there is probable cause to believe that the target of the electronic surveillance is . . . an agent of a foreign power." 50 U.S.C. §1805(a)(3)(A).
- The definition of "foreign intelligence information" turns on whether the relevant actor is a "United States person." If a "United States person" is involved, the information must be certified to be "necessary to" the nation's ability to protect itself against attack, hostile acts, sabotage, and the like, but if any other person is involved, the information need only "relate to" such concerns. 50 U.S.C. §1801(e).
- No "United States person" may be targeted for surveillance solely on the basis of activities protected by the First Amendment to the Constitution. 50 U.S.C. §1805(a)(3).

## "Probable Cause" at Los Alamos

In the investigation at Los Alamos, the FBI tried to get a FISA order for surveillance or a physical search of Wen-Ho Lee, a scientist at Los Alamos, but the Department of Justice (DoJ) refused to go to a FISC judge because the Department did not believe that the FBI's evidence was

sufficient to meet FISA's statutory requirements for "United States persons". The Thompson-Lieberman statement details the wrangling between the FBI and DoJ's Office of Intelligence Policy and Review (OIPR) and lists (on pages 14-17) 18 paragraphs of allegations that the FBI submitted to OIPR to show that there was, indeed, "probable cause" to apply for an order. DoJ's failure to act on that information is what baffles Senators Thompson and Lieberman.

The Senators are not the only persons who are baffled. Their statement says that FBI Director Louis Freeh believed there was probable cause. The President's Foreign Intelligence Advisory Board (PFIAB) said "the Department of Justice may be applying the FISA in a manner that is too restrictive, particularly in light of the evolution of a very sophisticated counterintelligence threat and the ongoing revolution in information systems." The chairman of the PFIAB, former Senator Warren Rudman, called DoJ's reading of FISA "one of the most baffling" parts of the Chinese espionage story. Energy Secretary Bill Richardson seems to agree with these conclusions. Thompson-Lieberman Statement at 20 n. 78.

When the Department of Justice refuses to forward a request to the Foreign Intelligence Surveillance Court even when the FBI has compiled the kind of facts that were arrayed in this case, then one can't help but wonder if FISA's "sound balance" has come undone.

## **Who Betrays America's Secrets?**

In judging "probable cause" with respect to "United States persons" [see the Appendix], it is essential to remember that the greatest threats to U.S. secrets come from those very same "United States persons" who have access to top secret information. FISA must be interpreted within the context of this hard fact.

From 1966 through April, 1998, the United States charged 98 persons with espionage, 80 of whom were U. S. citizens, and at least 4 of whom were permanent resident aliens. These 84 persons are "United States persons" under FISA. Non-resident aliens, even those from hostile countries, are not the primary problem in espionage and counter-intelligence.

Indeed, it may be rare for America's top secrets ever to be lost to espionage through the lone acts of an alien. In the 98 espionage cases from the past three decades, whenever an alien was arrested for espionage in the United States, the alien was only a courier, a handler, or some other intermediary between the American traitor and his foreign master. United States citizens accounted for 82 percent of all arrests for espionage (80 of 98), but they probably accounted for 100 percent of all secrets stolen. And, of course, the most valuable and deadly secrets all were sold by U.S. citizens.

One need only consider a list of some of the country's more notorious traitors to confirm the truth of this observation:

- Aldrich Hazen Ames, a former CIA counter-intelligence officer, was sentenced to life imprisonment for betraying 12 undercover agents, all of whom are now dead or missing. For selling his soul and his country's secrets, Ames received at least \$1.5 million.

- Harold J. Nicholson, a CIA branch chief, is the highest CIA officer ever convicted of espionage. He is serving a sentence of 23 years.
- Joseph G. Helmich, a former warrant officer in the U.S. Army, sold American secrets for \$131,000 and the rank of honorary colonel in the Soviet Army. Helmich is serving a life sentence.
- John Anthony Walker, Jr., a retired Navy chief warrant officer, led one of the most damaging spy rings in U.S. history. Walker and two others of his ring were given life sentences.
- Ronald William Pelton, a former communications specialist with NSA, was sentenced to life imprisonment for selling intelligence information to the Soviet Union.
- Earl Edwin Pitts, a former FBI agent, sold secrets to Moscow for \$250,000. Pitts got 27 years.

## **“A Sound Balance” Undone?**

FISA promised “a sound balance.” One desktop dictionary defines the adjective “sound” as meaning “having a firm basis,” “based on valid reasoning; sensible and correct,” “founded on thorough experience or knowledge,” “worthy of confidence,” and “marked by or showing common sense and good judgment.”

Senators Thompson and Lieberman and their staffs have performed an extraordinary service by documenting how FISA failed in one crucial case. Their work allows the rest of us — even those with neither security clearances nor access to relevant classified information — to judge whether FISA is working and, frankly, the results are disturbing, even frightening. Senator Lieberman said the investigation “was not a comedy of errors, but a tragedy of errors.”

If FISA’s “sound balance” has come undone, and we now have evidence that it has, either the Act needs to be amended or the Department of Justice needs to be reformed or both.

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**Sources.** The data on espionage arrests were taken from S. Cavanagh, “Individuals Arrested on Charges of Espionage Against the United States Government: 1966-1993,” CRS Rept. for Congress, 93-531 GOV (revised May 27, 1993) (“Of the 78 persons arrested, 61 were U.S. citizens; the other 17 were foreign nationals.”), and S. Cavanagh & S. Flagg, “Espionage in the United States: Individuals Arrested, 1993-1998,” CRS Rept. for Congress, no number (updated April 23, 1998) (“20 individuals were accused of espionage-related activities . . . [and] only one foreign citizen has been charged”). The joint statement of Senators Thompson and Lieberman is dated August 5, 1999, and titled, “Department of Energy, FBI, and Department of Justice Handling of the Espionage Investigation into the Compromise of Design Information on the W-88 Warhead.”

## Appendix: Probable Cause Under FISA

The question of what constitutes "probable cause" for purposes of 50 U.S.C. §1805(a)(3) is the most important question that must be answered for every FISA application and, of course, it was the central question in the Los Alamos espionage case.

It may be impossible to use mere words to explain what might constitute "probable cause" in the various kinds of cases that come before the Department of Justice and the FISC judges. At some level, the definition of "probable cause" is going to depend on the common sense and good judgment of those who apply the law to concrete facts. In a review of FISA, the Senate Intelligence Committee said, "The quality of the officials" who "review FISA surveillance requests and monitor compliance with minimization procedures" is "the single most important factor in the proper implementation of" FISA. "The Foreign Intelligence Surveillance Act of 1978: The First Five Years," S. Rept. No. 98-660, 98<sup>th</sup> Cong., 2d Sess. 25 (1984).

In their joint statement of August 5, 1999 [p. 13.], Senators Thompson and Lieberman wrote:

"According to the U.S. Supreme Court, 'probable cause' is a 'fluid concept — turning on the assessment of probabilities in particular factual contexts.' *Illinois vs. Gates*, 462 U.S. 213, 232 (1983). It does not mean proof to a high degree of certainty such as might be required in order to convict the defendant in a criminal proceeding. Rather, it reflects in essence a simple balancing of probabilities. Generally, 'probable cause' is to be determined according to 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States*, 338 U.S. 160, 175 (1949). As the FBI's General Counsel put it at the Committee's hearing . . . , '[p]robable cause in our view is more probable than not that this person is an agent of a foreign power, and it's a very fact-specific, case-by-case determination.'

"Indeed, 'probable cause' has traditionally been viewed as more flexible a term in the national security context than it is with regard to criminal investigations. As the Supreme Court put it in 1972, a 'different standard[] [of probable cause] may be compatible with the Fourth Amendment if [it is] reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.' *United States v. United States District Court*, 407 U.S. 297, 322-23 (1972).

"Th[at] case preceded the enactment of the FISA statute, and the degree — if any — to which it prescribes additional flexibility in the interpretation of 'probable cause' under that statute is unresolved."

On the question of "probable cause" under FISA, the RPC has found the following sources to be helpful: *United States v. Megahey*, 553 F. Supp. 1180, 1190-91 (E.D. N.Y. 1982); A. Cinquegrana, "The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978," 137 *U. Penn. L. Rev.* 793, 816 (1989) ("There continues to be concern over whether surveillance should be authorized, particularly against a United States person, when there is no finding of probable cause to believe a crime is being, has been, or is about to be (as opposed to the FISA standard of 'may be') committed and that evidence of criminal activity will be obtained."); and Note, "The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis," 80 *Georgetown L. Rev.* 843 (1992).